
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

DATE: APR 29 1992
CASE NO.: 90-ERA-60

In the matter of

WILLIAM DAN DEFORD
Complainant

v.

TENNESSEE VALLEY AUTHORITY
Respondent

Appearances:

Edward A. Slavin, Jr. Esq.
David A. Stuart, Esq.
For the Complainant

Brett R. Marquand, Esq.
Thomas C. Doolan, Esq.
John Slater, Esq.
For Respondent

Before: Daniel J. Roketenetz
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Statement of Case

This matter arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. 5851 et seq., hereinafter called "the

[Page 2]

Act." The Act prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who was engaged in activity protected by the provisions recited therein. The Act, designed to protect so-called "whistleblower" employees from retaliatory or discriminatory actions by their employers, is implemented by regulations found at 29 C.F.R. Part 24. An employee who believes that he or she has been discriminated against in violation of the statute may file a complaint with the United States Department of Labor within 30 days after the occurrence of the alleged violation. William Dan DeFord (hereinafter referred to as "DeFord" or Complainant) filed a complaint with the Wage and Hour Division, United States Department of Labor on July 3, 1989 alleging that he had been unlawfully terminated from his employment following a continuing pattern of harassment and intimidation by the Respondent, Tennessee Valley Authority (hereinafter referred to as "TVA")[1] (CX 4). The termination resulted from a company reduction in force (RIF) which took effect on June 16, 1989.

The Wage and Hour Office in Knoxville, Tennessee investigated the complaint and issued an Investigative Conciliation narrative report on January 23, 1990, finding a violation of "the provisions of Section 210 of the Act" and reporting on settlement proceedings in process. A subsequent report dated August 28, 1990 outlined new evidence that had developed that "confirmed one instance of intimidation and harassment." A final report of September 7, 1990 noted that a "determination letter was issued" based on discriminatory acts by the Respondent (PX 4).

Respondent filed a timely request for a formal hearing on August 20, 1990. A Notice of Hearing and a Prehearing Order was issued on September 12, 1990 (ALJX 1, 9). Following a failed settlement attempt and an ensuing battle of motions, a hearing was held on December 10, 1990 through December 14, 1990 in Knoxville, Tennessee. The parties at that time exhaustively litigated the issues and had every opportunity to be heard, to present evidence, and to examine and cross-examine witnesses. In addition, the parties submitted post-hearing briefs.

The following findings of fact and conclusions of law are based on my evaluation the record in its entirety, including the

[Page 3]

documentary evidence submitted, the appearance and demeanor of the witnesses who testified at the hearing and the arguments of counsel both at the hearing and in their briefs in relation to the relevant regulations and the provisions of the Act.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

The Complainant began to work for the Tennessee Valley Authority in 1971 (Tr. 236). He worked in the regional office in Knoxville, Tennessee. From 1974 through 1980, Complainant was a line manager in charge of the auditing internal and external engineering procedures for TVA's ongoing nuclear power projects. In 1980, he was demoted and subsequently filed a complaint under Section 210 of the Energy Reorganization Act. Ultimately, TVA was found to have violated the Act subjecting Complainant to adverse employment conditions for cooperating in an investigation by the Nuclear Regulatory Commission and he received reinstatement to a comparable position (Tr. 245). *See DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983). He was placed in a management position over audits and was thereafter moved to a line management position in the Engineering Assurance (EA) division (Tr. 249).

In 1988, consistent with a pattern of biannual reorganizations, Complainant's job classification was changed and in the Spring of 1989 TVA instituted what it called the "Hay management classification" system (Tr. 573, 835). The initial reorganization proposed eliminating an entire tier of management within the organization and a reduction in the Engineering Assurance department staff (Tr. 944). Complainant's position was reclassified from a Management position to "Senior Specialist" (Tr. 946-950). One other employee, Henry Jones, was similarly reassigned and these two individuals were the only persons in this particular job classification (Tr. 946).

The general reorganization plan that was developed involved a streamlining of TVA over a two year period, eliminating as many as 1000 employees by October 1, 1989 and 2000 by the end of 1990 (Tr. 367-368; RX 23). During the process of the reorganization, Oliver Kingsley was hired to replace Admiral Steven White as Senior Vice President in charge of Nuclear Power (Tr. 352-353). Concomitant with his new job, Kingsley took on the responsibility

---

for the reorganization of the Nuclear Power division of TVA, the umbrella group encompassing Engineering Assurance. Mr. Kingsley offered credible testimony that he spent several months reviewing TVA's operation. He determined by January, 1989 that the Engineering Assurance functions were duplicative in nature and that the department should be eliminated altogether with its necessary functions absorbed into other departments (Tr. 351-353, 455). Kingsley testified that he then assigned Frederick Moreadith, the Vice President of Nuclear Engineering (the umbrella division encompassing EA) and Anthony Capozzi, his assistant, the full responsibility of implementing the reorganization-elimination of the EA department (Tr. 458-459, 1016).

Anthony Capozzi, Complainant's direct supervisor, provided credible and detailed testimony about the reorganization plans. In the hierarchical scheme of TVA, Capozzi reported directly to Moreadith (Tr. 946). With the help of Capozzi and other specially

selected individuals, Moreadith developed a plan to implement the reorganization during the early part of 1989 (Tr. 400, 961-967). Capozzi testified that the reorganization plans were directed by TVA management to be maintained as confidential. The proposed plan that they developed entailed moving all production engineering to plant sites and dismantling all the in-house engineering divisions at the Knoxville headquarters except the Chief Engineering division (Tr. 1017-1018; RX 19).

Despite his many years of service and his management experience with TVA, Complainant was not consulted and not permitted to participate in any of the details of the reorganization. During this period, however, various decisions were made that directly impacted Complainant's area of responsibility. Capozzi admitted in his testimony that a manager was hired for the Complainant to supervise without the Complainant's input or the opportunity to interview the person. Moreover, the auditing department was placed under the supervision of Henry Jones, an area in which the Complainant had particular experience and expertise (Tr. 274). Notably, Henry Jones was the only other Senior Specialist and he was, unlike DeFord, chosen to be involved in some of the initial reorganization meetings (Tr. 273).

Rumors of the reorganization and/or elimination of Engineering Assurance surfaced quickly. Complainant testified that upon hearing the rumors he spoke to Capozzi about his concerns over the safety ramifications of the proposed reorganization (Tr.

---

279). After receiving no satisfaction, Complainant prepared a memorandum addressed to TVA Chairman Marvin Runyon and to Vice President Oliver Kingsley (Tr. 525). The memo outlined Complainant's concerns about the reorganization and articulated his opinions about the deteriorating safety concerns of TVA management. He noted particular situations indicative of the reoccurrence of the serious safety problems of the past such as harassment and browbeating of engineers and pressure applied to engineers concerning their reports of serious safety problems known as CAQs. The Complainant also stated his criticism of the proposed "owner/operator system" and concluded that the management policies in effect were compounding the safety problems (PX 2). Complainant initially sent the memo by interoffice mail to Runyon and Kingsley but, after talking to Capozzi, his immediate supervisor, who expressed concern about Complainant's action, he recalled the memo. On March 29, 1989, however, Complainant on further reflection, amended the memo and remailed it to Runyon and Kingsley (Tr. 282-288).

Shortly after receiving the memo, Kingsley testified that he spoke to Bill Willis, Executive Vice President and Chief Operating Officer of TVA, about investigating the complaints in the memo. At that time, Mr. Willis advised Kingsley of Complainant's prior "Department of Labor" case against TVA (Tr. 375). Kingsley proceeded to contact Moreadith and "directed him (to) make sure that everything in the memorandum be totally investigated and totally checked out" (Tr. 375). Moreadith had apparently received

some prior information from his assistant, Capozzi, about the retracted memo and then met with Capozzi to discuss what needed to be done about the Complainant's memo (Tr. 1025).

Moreadith testified that Kingsley sent him a copy of the memo. On April 7, 1989, he directed Capozzi to call Complainant, who was on assignment at the Watts Bar facility, and instruct him to return immediately to Knoxville for a meeting (Tr. 1025, 294). The Complainant returned for the meeting and utilized a hidden tape player to record the events of the meeting which included Capozzi, Moreadith and himself (Tr. 295-296). This meeting focused on the contents of the memorandum to Kinglsey and Runyon, but, also involved the discussion of the imminent changes taking place in TVA. Moreadith was noticeably angry. He characterized the Complainant's allegations as "unprofessional" because the Complainant had bypassed the normal chain of command by sending the memo directly to Runyon and Kingsley and argued that the memo

---

was factually erroneous (Tr. 296, 1080-1082, PX 16). Moreadith admitted this fact and testified that he was upset because he was going to be held accountable for Complainant's allegations (Tr. 1028). The meeting was described by Capozzi as somewhat disciplinary in tone ("semi-ass chewing) who also stated that it became "inherently understood that Moreadith did not want DeFord around in the new system" (Tr. 1184-1185). The meeting concluded with Moreadith ordering Capozzi and Complainant to talk about the problems outlined in the memo and to report back to him (Tr. 1030).

It is significant that just prior to the meeting, on April 4, 1989, Moreadith had presented his final draft of the reorganization plan to Kingsley (Tr. 1017). In general, the final reorganization involved moving the design control responsibilities from Engineering Assurance to the Chief Engineer's division and to transfer all other functions of EA to Nuclear Quality Assurance (Tr. 1017-1018). Earlier in the year, sometime around early March, Moreadith had presented his proposed organizational structure that revamped the hierarchical scheme of TVA to five areas of concentration that would each report to the Vice president. These five principal "reports" would be the three site managers, the chief engineer, and a new manager of services. Moreadith had outlined the structure of each of these units including their respective "subordinate" positions, pay grades and the number of positions to be assigned each unit (Tr. 1019). Complainant's position, Senior Specialist, no longer existed under Moreadith's new organization design. Notably, as these changes were being developed by Moreadith and his group, Henry Jones, Complainant's peer in the Senior Specialist position, transferred out of EA to the Brown's Ferry unit upon the request of the Manager of that site, Benny Bounds. Edward Brabham, the Human Resources Manager for the Nuclear Power division, testified that Benny Bounds reported directly to Moreadith (Tr. 900-902).

Another EA employee, Dave Malone, who was below the Complainant in rank within the division, was called upon by Capozzi and Moreadith, to the exclusion of

Complainant, to participate in the reorganization planning (Tr. 961, 1221). Malone at the time was the head of the technical audit department apparently replacing Henry Jones and this department was to remain "intact" following the reorganization (Tr. 961-967). Capozzi testified that he needed the technical expertise of Malone as the auditing person for approval of the reorganization by the NRC (Tr. 965). However, the record is clear that the

---

[Page 7]

Complainant had more extensive experience in the auditing functions of EA than anyone else. He even wrote the auditing procedures and was a certified lead auditor (Tr. 278) Yet, Capozzi removed auditing from Complainant's area of responsibility, transferring it first to Henry Jones, then to Dave Malone shortly before beginning their reorganization plans (Tr. 277- 278). Again, as the reorganization plans were secretly being developed, Malone conveniently moved into the new organization, and, thereby was not made subject to the RIF.

Indeed, as the plans for the elimination of EA were being formulated, Kinglsey and Moreadith insisted upon absolute confidentiality and Capozzi testified that this was the reason for excluding Complainant from the planning meetings (Tr. 964). In the end, though, apparently all those involved in the planning found their way out of EA or made plans to transfer out prior to the RIF notices being sent. Capozzi, in fact, obtained a new position in Chattanooga and listed his Knoxville house with a realtor in the early part of the year supposedly before any plans were actually developed (Tr. 970, 1220). Jones moved to the Brown's Ferry operation in late March, prior to the final approval of the reorganization proposal. Malone was placed in a position in the restructured unit (Tr. 420, 906-907).

The reorganization plan, as it was developed by Moreadith and his select group, involved the elimination of positions only, not individual employees. Brabham testified that once management determined which positions would be eliminated the reduction in force guidelines became operative and the "process took care of itself" (Tr. 911). It is significant, though, that only the Complainant remained in the EA division in the lower management PG9 position at the time of the RIF (Tr. 913). All of other similarly situated managers were transferred and the decision as to what managerial or other positions would be eliminated was made exclusively by Moreadith and his group sometime in April, following approval of his plan by Kingsley (Tr. 458-459).

Sometime after the meeting between Moreadith and the Complainant, the Chief Engineering manager, Bill Raughley testified that he had offered to help Moreadith find a position for DeFord in his group which would be remaining in Knoxville. Moreadith admitted in his testimony that he had specifically refused this offer, claiming that the Complainant should not receive special treatment (Tr. 1031; PX 4). Instead, Moreadith

---

[Page 8]

told Raughley that "it was a premeditated management decision to put competition into the reduction in force to the greatest extent possible" (Tr. 1039) Moreadith asserted this position despite the fact that all Complainant's peers had been privy to the inside information about the impending RIF and had moved out of the department. In addition, Capozzi admitted in his testimony that TVA maintained a haphazard pattern of hiring practices, posting some job openings and not others. The record, indeed, reflects that TVA management often made their selections internally, sometimes structuring a job around a particular person's qualifications (Tr. 749-750; 761) In the end, the decision on what jobs would be posted during this RIF was Moreadith's (Tr. 1040).

The Complainant was under the mistaken impression that TVA would similarly find him a position in the reorganized structure (Tr. 1319). He applied for only one posted position, the new Manager of Services job for which he had previous experience. He was not, however, considered for the position. Instead, Teresa Perry, who had not applied for the Manager of Services position but interviewed for an entirely different job with Moreadith, was hired at his recommendation, for this Senior Management slot in the new organization (Tr. 853, 1073).

A formal announcement and press release had been made on April 26, 1989 outlining the new reorganization plan (Tr. 589-591, RX 20, 21). On May 12, 1989, the Complainant received his official RIF notice to be effective June 16, 1989 (PX 5). In late May, 1989, another job opened in the Chief Engineer's department, but, DeFord failed to apply for the position because he did not feel he should have to apply for positions (Tr. 637, 1319). In fact, just prior to this official RIF date, Capozzi testified that with the approval of Kingsley, he did offer Complainant a position in Chattanooga that had not been posted (Tr. 467). However, Complainant testified that he refused the job for personal reasons, being unable to relocate and also because Capozzi had indicated that tbis new job was subject to downsizing in a year (Tr. 484, 1176).

Once the structural and organizational decisions were completed the actual decision on who received RIF notices was made by the Human Resources Department in each division subject to a reorganization and were made according to Federal Regulations (Tr. 905-911); *See* 5 CFR 351. These Regulations outline a

---

[Page 9]

system for retention of employees for existing positions, giving preference to those with seniority, a veteran status and other considerations. However, these decisions were governed by the general format of the reorganized unit, which, in the case of Engineering Assurance, was designed by Moreadith. Only those whose "function was abolished received RIF notices" (Tr. 822). Complainant's function in fact was not abolished, but, combined into several areas in the Chief Engineering division under Bill Raughley (Tr. 446-447). Within the context of Engineering Assurance, though, Complainant was the

only PG9 personnel remaining at the time the RIF decisions were made in late April, 1989 (Tr. 890).

Just prior to the issuance of Complainant's RIF notice, on Play 1, 1989, Moreadith testified that he requested a meeting with the legal department to review an internal memo he had prepared, concerning the events of the April 7, 1989 meeting with Complainant (Tr. 1099-1100). The Office of General Counsel attorneys reviewed Moreadith's initial memo and instructed him to edit out portions that were deemed damaging to TVA. All copies of the original memo disappeared (PX 1, PX 4). Following the filing of the complaint by DeFord and notification to TVA, an internal investigation began of the allegations. The Office of the Inspector General of TVA (OIG) determined that there had been violations of internal policy about employee complaints, TVA Code II, Expression of Staff Views in the meeting of April 7, 1989 (PX 1). However, this internal unit found "insufficient evidence to conclude that the draft" was altered to delete "misconduct" (PX 1).

The OIG report relates that it also pursued the investigation of Moreadith's refusal of Raughley's offer to find a place for Complainant in Chief Engineering division. From interviews with Capozzi and one other unnamed manager, the OIG concluded that Moreadith had in fact declined the offer primarily due to Complainant's memorandum and instilled the "impression to at least one of his subordinates that DeFord was not to be hired because he raised concerns" (PX 1 p. 14). Moreadith insisted to the OIG that he "did not recollect ever advising a TVA manager not to offer DeFord a position." *Id.* at 13. The OIG asked Moreadith to sign a statement to that effect on or about March 26, 1990 but he declined, alleging that the investigative officer had informed him that he "could be subject to prosecution" if the statement were proven false. *Id*. The very next day, on March

---

[Page 10]

27, 1990, Moreadith left the employment of TVA with a $50,000.00 cash settlement (Tr. 1062; PX 4, Wage & Hour Report). In his testimony at the hearing, though, Moreadith did recall the conversation with Raughley, but, insisted that he did not forbid Raughley to make a job offer to Complainant, but rather indicated that it would be unfair to make a position for him when so many others were being "put out in the streets" (Tr. 1039).

The Complainant testified that he had spent his time prior to the effective date of his RIF notice applying and interviewing for various positions outside of TVA (Tr. 319-321). In fact, he had been interviewed by Martin Marietta and as time passed failed to hear anything. The Complainant spoke to Capozzi about this and Capozzi offered to call Martin Marietta to determine if there had been some "blacklisting" of him due to his past "whistleblower" action against TVA (Tr. 1302). The Complainant testified that he specifically asked Capozzi not to use his name believing at that time that Capozzi really wanted to help him (Tr. 1303). Capozzi agreed to make the call, but, instead referred the matter to Sue Wallace who, in turn, referred it to Bill Willis who finally made the phone

call to Martin Marietta (Tr. 1273-1274). Willis testified, however, that he had not been told that he should not use DeFord's name, and, in the context of the call both DeFord's name and the term "whistleblower" were used (Tr. 213-214, 667, 881). Complainant never heard from Martin Marietta again about the position and was later told by a TVA employee that he had not received a favorable recommendation from TVA (Tr. 193). Complainant's RIF took effect on June 16, 1989 and he is currently working on a contract basis with another company (Tr. 328-329).

Upon receipt of the complaint, the Wage and Hour division of the Department of Labor initiated an investigation and issued a determination letter finding unlawful discrimination based primarily on the actions of Moreadith during the April 7, 1989 meeting and on the refusal of the job offer by Raughley (PX 4). In addition, Wage and Hour found that the June 15, 1989 conversation between Willis and a Martin Marietta official was in violation of the Act due to Willis' statements of Complainant's past "whistleblowing" activity. The Wage and Hour investigatory officer recommended reinstatement to TVA "with the maximum amount of back wages, fringe benefits that can be assessed including any other monetary amounts that might be levied against TVA under the law" (PX 4). TVA timely appealed this finding.

B. Issues

1. Whether the complaint filed July 3, 1989 is timely under the Act?
2. Whether the alteration of the internal memo concerning the April 7, 1989 meeting and the destruction of the original amounted to unlawful spoliation of evidence?
3. Whether the Complainant engaged in protected activity under the Act?
4. Whether the Complainant was subjected to adverse action as a result of protected activity under the Act?
5. Whether the Respondent/Employer was aware of the protected activity at the time of any adverse action against the Complainant?
6. Whether the Employer failed to demonstrate that an adverse action would have occurred despite the Complainant's protected activity?
7. Whether the Complainant is due compensatory damages for emotional duress, damage to his professional reputation, or hedonic damages for his loss of enjoyment of life?

C. Discussion

Section 5851 of the Energy Reorganization Act is a remedial statute designed to "protect workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); 42 U.S.C. 5851. Initially, it must be shown that the Respondent is an employer subject to the provisions of the statute. *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983).

Then, the legal analysis for this action, which has been modeled after other discrimination actions, involves a *prima facie* showing by the Complainant that:

1. he was engaged in protected activity;
2. he was subjected to an adverse action; and,
3. the employer was aware of the protected activity when it took the adverse action. *McCuistion v. Tennessee Valley Authority*, 89-ERA-6 (Secretary Of Labor Nov. 13, 1991).

[Page 12]

This *prima facie* burden also requires that the Complainant provide sufficient evidence, direct or circumstantial, to establish an inference of causation that the protected activity motivated the employer's action. *McCuistion; supra*; *Dartey v. Zack Co*., 80-ERA-2 (Secretary of Labor, Apr. 25, 1983); *See also, Mackowiak v. Univ. Nuclear Systems Inc., supra*.

As in other discrimination cases, once the Complainant carries his *prima facie* burden, the burden of production shifts to the employer to demonstrate a legitimate, non-discriminatory reason for its actions. *McCuistion v. Tennessee Valley Authority, supra; Seer Texas Department of Community Affairs v. Burdine*, 450 U.S. 241 (1980). It the employer claims that there were "independent legitimate grounds for the adverse action and that the action would have occurred even in the absence of the protected activity," then the analysis proceeds under a "dual motive" test. *Pogue v. U.S. Dept. of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991). However, if the employer establishes a purely legitimate reason for the adverse action, then the burden once again shifts to the Complainant to demonstrate that reason as a pretext for discrimination. *McCuistion*, supra slip. op. at p. 6; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1971). Where a claim demonstrates a wholly retaliatory reason for the adverse action and the employer counters with a wholly legitimate reason, the pretext model is appropriate. *McCuistion, supra* slip. op. at p. 2 n.1.

However, in the Title VII context, which is the basic model for the inquiry, the United States Supreme Court recently explained that once it is shown that an illegal reason "played a motivating part in an employment decision" the burden of production is placed squarely on the employer to show that "it would have made the same decision even if it had not allowed (an illegal consideration) to play such a role." *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989) This is the dual motive analysis which outlines that if an adverse action against an employee is based on both legitimate and illegitimate motives "the employer bears the risk that the influence of the legal and illegal motives cannot be separated." *Pogue v. U.S. Dept. of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991) (*quoting, NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[Page 13]

In the instant case, the Complainant makes no direct allegation, nor is there any reason to believe, that TVA's entire 1988-89 reorganization and reduction in force program which affected over 1000 people was completely based on illegal retaliation against him. Complainant's allegation, instead, seems to focus on the RIF as it was applied to his circumstances, and that he was included in the RIF for illegal reasons to retaliate against his protected activity. TVA counters that the RIF policy was wholly legitimate, and, that the Complainant would have been subject to the RIF despite any protected activity. Fashioned as such, this is a classic dual motive case, and, the analysis will follow the format outlined in *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and its progeny. *See Price Waterhouse, supra; Pogue v. U.S. Dept. of Labor, supra; Mackowiak v. Univer. Nuclear Systems, Inc., supra.*

1. Timeliness of Complaint

The Act specifically provides that a complaint must be filed within thirty days of the adverse action. 42 U.S.C. 5851. The thirty day period begins when "definite" or "final and unequivocal" notice of the adverse action is given. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). The Complainant received his reduction in force notice on May 12, 1989. However, the notice stated that that he would be terminated under the program "unless you are offered and accept another TVA position" (PX 5). The effective date of his RIF was June 16, 1989 (PX 5). The notice was signed by Anthony Capozzi, Complainant's immediate supervisor, who as late as June 7, 1989 did in fact offer Complainant another TVA position (PX 6).

These circumstances are markedly different then the events in *English* where the Complainant had notice of a layoff from a temporary assignment "if she did not secure suitable permanent position by the end of her temporary assignment." *English, supra* at 961-962. Here Complainant was not a temporary employee facing the end of an assignment. Rather he was a full-time, permanent employee with nineteen years of service at TVA. Moreover, his notice of termination through a reduction in force was offset by the real possibility that he would or could receive an offer of another position.

The employment practices of TVA clearly demonstrate that jobs were often created within the organization for their

---

employees. Bill Raughley testified that he offered to find a job for Complainant and that this practice was common within the organization (Tr. 760-761). In fact, within the context of this RIF the,re were specific instances where lateral transfers were designed for particular employees who were peers of the Complainant. Henry Jones' position at Brown's Ferry was created for him, and, Dave Malone transferred to a newly created job in the Chief Engineer's department (Tr. 966). Thus, the Complainant's belief that TVA would eventually find him a job in the organization was not unreasonable, nor, was it

unreasonable for him to believe that he did not have to apply or compete for positions in TVA (Tr. 627-637).

TVA demonstrated a propensity to create and recreate positions which, in my opinion, caused the Complainant to rely on these circumstances throughout the duration of his RIF notice. Accordingly, because the Complainant's RIF notice contained the very real contingency of a new position within the reorganized TVA and relying in particular on TVA's practice of making or creating jobs to permit lateral transfers, I find that the Complainant's statutory filing period did not begin until the effective date of his RIF, *i.e.*, June 16, 1989. It was not until this date that Complainant had final, unequivocal notice that TVA was not going to find him a position in the new organization. Complainant filed his actual complaint on July 3, 1989 which is clearly timely under the Act.[2]

2. Complainant's Non-selection

Respondent claims that the complaint filed in this action was incomplete as to allegations of illegal acts on their part involving the non-selection of Complainant for a new position. (Resp. Brief at p. 67)

This objection is entirely without merit, however, because the Regulations do not require specificity in the complaint. Rather 29 C.F.R. § 24.3 provides that the complaint "include a full statement of the acts or omissions with the pertinent dates which are believed to constitute a violation." (Emphasis supplied) 29 C.F.R. § 24.3(c). Moreover, the regulations require a full investigation by the Administrator with a statement of the findings and conclusions from their investigations. 29 C.F.R. § 24.4

The issue of Complainant's non-selection was discovered initially by TVA's own investigatory unit, the Office of Inspector General (OIG) and then by the Wage and Hour investigators. (PX 1, 4) Therefore, at the time the complaint was filed these facts were not known to Complainant. Moreover, one particular instance of non-selection did not occur until after the filing of the complaint, Complainant's non-selection for the Manager of Services position which occurred in August, 1989. Accordingly, I find the complaint to be a complete statement of the then-known instances of Respondent's illegal acts and the evidence in the record of non-selection events fully admissible, resulting from the required investigation under the implementing regulations.

3. Spoliation Evidence

The Complainant alleges that the alteration of the internal memo composed by Moreadith concerning the April 7, 1989 meeting amounted to unlawful spoliation of evidence in anticipation of or in preparation for trial. The common law policy regarding spoliation of evidence applies to pretrial discovery proceedings generally and permits a negative inference against the guilty party that the destroyed evidence "would be

unfavorable to the spoliator" and can induce "a burden shifting presumption" concerning the contents of the evidence. *Welsh v. U.S.*, 844 F.2d 1239 (6th Cir. 1988). The evidence in the record demonstrates that the May 1, 1989 meeting between Moreadith and TVA's corporate counsel did result in the amendment of this memorandum, and, that the original memo is no longer available. However these acts occurred well before the complaint was filed or when notice was given to TVA of pending litigation.

The adverse inference against the alleged spoliator, moreover, is not mandatory and is dependent upon the facts of each case. *Welch*, at 1247. In this case, there is little to counter the inference that TVA's counsel and Moreadith himself were concerned about the implications of the April 7, 1989 meeting in the context of Complainant's impending RIP. However, their acts amounted only to housekeeping in anticipation of possible litigation, not spoliation of evidence during the time of a pending trial. Clearly, their acts of meeting on May 1, 1989 and rewriting the memo demonstrate knowledge and an intent to gloss over a rather significant event, the April 7, 1989 meeting. As such, this evidence is fully admissible to demonstrate motive or

---

knowledge of a potential problem in effecting Complainant's RIF. *See* 29 C.F.R. § 18.404(b). However, I find that these acts do not amount to an abuse of the pretrial discovery process that would authorize invocation of the common-law spoliation presumption, relieving the Complainant of carrying his burden to prove a retaliatory discharge. Accordingly, the circumstances surrounding the May 1, 1989 meeting and the modification of Moreadith's memo are herein considered as circumstantial evidence of Moreadith's animus toward the Complainant and his knowledge of the possible consequences of his disciplinary meeting as well as TVA's concern in this area, but, not as spoliation evidence.

3. *Prima Facie* Evidence

The first element of the required *prima facie* showing is without contention. TVA is an employer subject to the Act. The applicable provisions of the Act, Section 5851, prohibits discrimination against employees who:

> 1. commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> 2. testified or is about to testify in any such proceeding, or;
> 3. assisted or participated or is about to assist or participate in any manner in such a proceeding or in any such manner in such a proceeding or in any action to carry out the purposes of this Chapter or the Atomic Energy Act of 1954, as amended.
> 42 U.S.C. § 5851(a).

In light on the broad remedial purpose of Section 5851, and, the statutes' wording encompassing "any action to carry out the purposes of" nuclear safety regulations, the courts have extended the coverage of the Act to internal safety complaints by employees to their management. *See Mackowiak v. Univ. Nuclear Systems, Inc., supra; Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 14-8-5), *cert. denied*, 478 U.S. 1011 (1986);

[Page 17]

Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984); *McCuistion, supra*. Indeed, the compelling purpose of the statute is "preventing intimidation" of employees and this protection is clearly as necessary in the reporting of safety or quality problems internally as well as directly to the Nuclear Regulatory Commission. *DeFord v. Sec'y of Labor, supra; See Mackowiak*, at 1163; *Kansas Gas & Electric*, at 1511-1513; *Hasan v. Nuclear Power Servs., Inc.*, 89-ERA-24 (Sec'y of Labor, June 26, 1991).

The Complainant wrote a multi-page memorandum on March 29, 1989 to the TVA Board Chairman and to his most senior superior, the Vice President of Nuclear Power, Oliver Kingsley, outlining concerns about safety and management's inattention to existing safety problems in the engineering division. Complainant purposely broke from the chain of command after receiving no favorable response to his concerns from his immediate supervisor, Capozzi (Tr. 525). The memo, titled "Differing Staff Opinion Concerning Safety Issues" included allegations of harassment of engineers concerning their reports of safety violations, specific examples of safety problems, and voiced concern about management's decisions to reorganize, destaff, and to utilize an owner-operator format as detrimental to safety (PX 2). Clearly, the content of the memo is an internal safety complaint and thereby falls under the Act as protected activity. *Mackowiak, supra*.

The memo in and of itself generated a considerable amount of action from TVA management, primarily from the Complainant's direct managers, Frederick Moreadith and Anthony Capozzi. Oliver Kingsley had called Moreadith on April 6, 1989 and discussed the memo (Tr. 37 5). Kingsley, at that time had knowledge of Complainant's past "DOL case" and instructed Moreadith to investigate the memo. *Id.* In addition, both Moreadith and Capozzi had knowledge of the original draft of the memo, but were under the impression that it had been retracted (Tr. 1025). Following the phone conversation with Kingsley, Moreadith received a copy of the memo and then discussed its contents with Capozzi. Moreadith directed Capozzi to call the Complainant and schedule a meeting with him that same day, April 7, 1989 (Tr. 1025-1030). Capozzi credibly testified at the hearing that Moreadith was very upset about the memo (Tr. 1203). Moreadith himself admits he was angry because Complainant went outside the chain of command which left him accountable to his superiors (Tr. 1028).

[Page 18]

Capozzi contacted Complainant at the Watts Bar site and directed him to return to Knoxville for the meeting. Capozzi offered unrebutted and credible testimony that Moreadith had indicated that he could handle this incident similar to another "whistleblower," an employee named Lau (Tr. 1214). According to Capozzi, Moreadith conducted the meeting in a "semi-ass chewing" manner (Tr. 1184). The tape recording of the meeting demonstrates the disciplinary tone of the meeting, and, Moreadith's concern that these complaints were directed over his head, outside the chain of his command (PX 16, 15). It is clear from the contents of the tape recording and through Capozzi's testimony that this meeting was designed by Moreadith to be disciplinary in nature rather than investigatory as Moreadith contended in his testimony (Tr. 1026-1030). Moreadith testified at the hearing that he had no intent to discipline or harass the Complainant (Tr. 1030). Yet, he did not deny that he felt that the concerns were "professionally irresponsible" or that he accused Complainant of "convoluted logic" (Tr. 1094). Even though Moreadith at the conclusion of this meeting directed Capozzi and Complainant to discuss or "hash out' the problems outlined in the memorandum, it is clear in this record that Moreadith was not yet finished with DeFord (Tr. 1025).

Capozzi testified at the hearing, and in the Inspector General's investigation, that after the April 7, 1989 meeting, it was "inherently understood" that Moreadith did not want the Complainant to continue in TVA's employ (Tr. 1184, Px 1 at p. 13). Coincidentally, these individuals were, at the same time, involved in the confidential reorganization plans for the Nuclear Power division and the elimination of Engineering Assurance positions. Moreadith, as noted earlier, refused Raughley's offer to find a position for Complainant in the newly organized Chief Engineer's division, insisting that he was not going to give DeFord any special treatment (Tr. 1031) This occurred within days after Complainant's memo was sent to Runyon and Kingsley and just prior to the April 7, 1989 meeting (Tr. 748). Moreover, Complainant was one of two most senior subordinates in EA; but, he alone was excluded from the reorganization plans for the alleged reason that the plans were directed to be confidential (Tr. 273, 960). TVA offered no reasonable explanation for his exclusion, and, at least one lower ranking level employee was included in the reorganization meetings (Tr. 961). Complainant, in the end, was left totally uninformed about the proposed elimination/consolidation of the engineering units in the Nuclear

---

Power division of TVA.

Moreover, it is significant, that Henry Jones, who had been involved in the confidential reorganization plans, was moved into a position at the Brown's Ferry facility at the request of one of Moreadith's other "subordinates" (Tr. 845, 1097). Dave Malone, the lower ranking person on the reorganization committee was placed in a position in the newly organized unit and Anthony Capozzi found a position in Chattanooga, all before the announced elimination of Engineering Assurance (Tr. 906-907, 1244). It is clear from the evidence in the record that none of the individuals picked by either Capozzi or Moreadith to be part of the reorganization team received RIF notices. Thus, throughout

this tangled web I find a clear pattern of discriminatory treatment. In particular, I note the exclusion of Complainant from the reorganization process, Moreadith's refusal of Raughley's job offer while tolerating or accepting the special treatment afforded other participants in the reorganization. Coupled with the disciplinary meeting, which demonstrates clear animus on the part of Moreadith toward the Complainant I find that the motive to terminate DeFord existed. Moreover, because Moreadith was the author of the reorganization plan, he also had the opportunity to implement his unlawful scheme.

As a result of the exclusive and secretive pattern of events, all of the involved individuals found their way out of Engineering Assurance, leaving Complainant alone in a pay group and organizational structure destined for elimination. The initial proposal to eliminate Engineering Assurance was developed by Moreadith and presented to Kingsley on April 4, 1989, just three days prior to the April 7, 1989 meeting (Tr. 1017). Throughout the month of April, 1989, the plans became finalized and the decision on what positions would be subject to a reduction in force was made in late April, 1989 (Tr. 458). Significantly, Moreadith, in his testimony, demonstrates some understanding as to how the regulations on reductions in force work. He testified that he determined the new organizational structure in which Complainant's position was proposed to be eliminated (Tr. 1017- 1019). Moreover, he testified that "in most cases" it only becomes clear who will be RIFed once the organizational structure is established (Tr. 1021). Thus, Moreadith's testimony permits the strong inference that he was aware that Complainant would fall under the RIF provisions due to his planned elimination of DeFord's position (Tr. 1020).

[Page 20]

The evidence of the May 1, 1989 meeting with TVA's in-house counsel demonstrates a further recognition by Moreadith that the events of the April 7, 1989 meeting could be damaging either to him or to TVA (Tr. 1099-1100). It is especially significant that within this time frame the reduction in force decisions had been made, but, the notices had not yet been mailed, allowing an inference of anticipatory behavior. In the end, the evidence in the record supports a finding that in the process of a legitimate reduction in force at TVA, Moreadith found the opportunity to retaliate against the Complainant. As Moreadith himself candidly testified in describing the circumstances of the RIF in 1989:

> Well, you could say that the Nuclear Engineering management set up a situation where the decision (to RIF Complainant) would be automatic ... we came up with the organization configuration ... we decided what we wanted to be located where and we made some preliminary decisions on how many persons we thought would be needed ... then we came up with-position descriptions where there were new jobs created ... then we started to fill up the organization (Tr. 1077-1078).

Clearly, Moreadith had the motive, knowledge and opportunity within the reorganization plans to orchestrate a termination of DeFord disguised as a facially legitimate reduction in force. Coupled with the evidence of his animus against the

Complainant, I find that the Complainant has met his *prima facie* burden of demonstrating illegal discrimination against him from the sequence of events surrounding the reduction in force and planned reorganization of TVA in 1989.

At this juncture though, it important to note that I perceive no direct and very little, if any, circumstantial evidence of a general conspiracy through the ranks of TVA's upper management against the Complainant. In particular, the phone call from Vice President Willis to Martin Marietta, though perhaps imprudent, is not enough on its own to demonstrate a concerted effort by TVA officials to terminate DeFord. Willis may have acted improperly, but there is no evidence or reason to believe that TVA officials wanted to preclude Complainant from finding another position outside their ranks.

Rather, I find that Moreadith, as the person with the

---

authority and responsibility of the reorganization plan and as the individual with a demonstrated illegal motivation, manipulated the reduction in force within a very short time of the Complainant's memorandum to Chairman Runyon and the disciplinary meeting of April 7, 1989, so as to include the Complainant in the RIF. His acts as TVA's Vice President of Nuclear engineering, though, are fully attributable to the TVA unless there is rebuttal evidence tending to prove that Complainant would have been reduced in force despite Moreadith's illegal acts.

4. TVA Rebuttal Evidence

A. Reduction in Force

Respondent TVA correctly argues in rebuttal that the Courts have increasingly scrutinized complaints of discrimination in the context of facially valid reductions in force plans, affording a presumption of "wide discretion" in agency's RIF reorganizations. *Gandola v. Fed. Trade Comm.*, 773 F.2d 308 (D.C. Cir. 1988). The Sixth Circuit Court of Appeals in one case of alleged age discrimination went so far as to impose an additional *prima facie* burden on a Complainant to prove that the RIF was not presumptively valid. *Barnes v. Gencorp*, 896 F.2d 1457 (6th Cir. 1989). TVA, therefore, stands on the laurels of a general presumption that Complainant's reduction in force must be legal because they have wide discretion to reorganize their operation. Further, TVA asserts that there is no proof of any bad faith or under-handed scheming to demonstrate an illegal motivation in this case.

However, to the contrary, as found above, Complainant has demonstrated sufficient instances of bad faith and the necessary *prima facie* elements, in the acts of Moreadith alone, to support a finding of illegal adverse action against him within the context of TVA's reduction in force. TVA insists that there were legitimate management reasons for the reduction in force in general which precludes the finding of any violation in the

circumstances of Complainant's protected activity and subsequent termination. Although, I do not find overall RIF was illegally motivated, the facts of this case nevertheless demonstrate that as to the Complainant the Respondent's Vice President of Nuclear Engineering seized upon the general reorganization and otherwise legitimate reduction in force in order to retaliate against him for his protected activities. The burden rests with Respondent

---

[Page 22]

to negate the evidence of illegal motivation and to provide affirmative evidence that the Complainant would have been terminated anyway.

B. RIF as applied

There is considerable evidence of Moreadith's animus towards Complainant for the memo he wrote to Chairman Runyon and Vice President Kingsley. Capozzi, the second in command in Nuclear Engineering, offered numerous statements in his testimony that Moreadith simply did not want Complainant around the organization anymore, and, that Moreadith's feelings toward Complainant were well known to subordinate managers (Tr. 1185, 1213).

The Respondent offers no explanation for the fact that Complainant was the only line manager left in the Engineering Assurance organization and thereby subject to the RIF. Moreover, the Respondent fails to explain why the Complainant alone was required to apply for replacement positions within the newly organized unit while others were transferred to new positions primarily before the RIF plans were even completed. Significantly, Capozzi never told Moreadith about the singular job offer made to Complainant, an offer authorized through Kingsley, and made without Complainant applying for the position (Tr. 1212). I find that this eleventh hour attempt to neutralize any illegal behavior does not redeem Respondent because it has every appearance of an illusory or pretextual offer. The facts demonstrate that the job was subject to a later "downsizing" and required a relocation that was known by Capozzi to be unacceptable to Complainant (Tr. 1008, 1170-1171).

Finally, neither TVA nor Moreadith provide any rationale for the refusal of Raughley's job offer for Complainant. Rather, it is clear that Moreadith applied a distinct set of rules to Complainant's situation while allowing others to be transferred out of EA prior to the reduction in force. This *prima facie* evidence of discriminatory treatment stands unrebutted. Therefore, I find that Respondent has failed to satisfy its burden to show that Complainant would have been subject to the reduction in force notwithstanding his protected activity.

5. Damages

Upon a finding of a violation, 42 U.S.C. 5851 (b) (2) (B)

[Page 23]

prescribes that "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the Complainant to his former position together with the compensation (including back pay) terms, conditions, and privileges of his employment." In addition, the statute authorizes the payment of compensatory damages and "all costs and expenses (including attorney's and expert witness fees) reasonably incurred ... in connection with the bringing of the complaint." There is, however, no authority under the statute for exemplary or punitive damages. *Norris v. Lumberman's Mutual Casualty Co.*, 881 F.2d 1144 (1st Cir. 1989).

The Complainant requests his statutory remedy of reinstatement along with affirmative orders that Respondent eliminate any reference of his termination, negative evaluations, or notations concerning his protected acts in his personal employment records, a cease and desist order against any future determination, and publication of this Decision and Order in the Employee newspaper, "Inside TVA" (Compl. Brief at p. 131) In addition, Complainant seeks compensatory damages for back pay, litigation, medical and job search expenses, damages for pain and suffering, emotional distress and damages to his professional reputation in the amount of $800,000.00 (Compl. Brief at pp. 130-131). Complainant however must provide "competent evidence" of any subjective injury and proof that those injuries were the "proximate result" of Respondent's unlawful acts. *Busche v. Burkee*, 649 F.2d 509, 519 (7th Cir. 1981)(*quoting, Carey v. Piphus*, 435 U.S. 247, 264 (1978)); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y of Labor, Oct.

a. Reinstatement, Back Pay, and Expenses

The remedies outlined under the Act have the primary purpose of making the injured employee whole from the injury incurred as a result of the wrongful termination. *See Blackburn, supra.* Reinstatement to his former or equivalent position is mandatory under the Act along with any other "terms or conditions" such as pension and medical benefits that may have been part of his former position. However, the award of back pay under this "make whole" scheme must be offset by any earnings accrued by the Complainant following his wrongful termination.

The Complainant's annual salary at TVA at the time of his termination was $72,700.00 (Tr. 328). Complainant entered into a contract agreement for work at some time following his termination

[Page 24]

from TVA that offered a possible annual salary of $66,400.00 (Tr. 328). However, there is nothing in the record that reflects when he began this work or how much work he

earned under this contractual situation. Thus, an accurate determination of the amount of back pay is not possible on the facts in the record at this time.

Similarly, Complainant's pension and annuity benefits must be restored or reimbursed, in full, as part of his conditions of employment. However, again there is no evidence in the record of Complainant's lost pension or annuity benefits to make such an award. Furthermore, Complainant must be reimbursed for any medical insurance or other benefits that were maintained as a condition of his employment and that were lost upon his termination. Finally, Complainant has requested reimbursement for his attorney fees and costs as authorized under the Act, and, thereby is due the "aggregate amount of reasonable costs" associated therewith. 42 U.S.C. 5 5841. Again, the record fails to provide documented evidence of these expenses.

Accordingly, the record must remain open to receive evidence on the amount of back pay, other employment related benefits due Complainant offset by any accrued earnings or replacement benefits and documented evidence of attorney fees and costs incurred in the bringing of the complaint. The Complainant shall file within twenty (20) days of the affirmance of this Recommended Decision and Order by the Secretary of Labor: (1) a documented list of all claimed backpay, lost pension benefits, or costs associated with medical insurance or other employment related benefits that would otherwise not have been incurred as a result of his wrongful termination, (2) a list of any income or benefits which would constitute offsets to the above, (3) documentary evidence of job search expenses, and, (4) a documented schedule of attorney fees and costs incurred in the pursuit of this claim. Respondent will have twenty (20) days thereafter to file any objections with this office. Thereafter, a supplemental recommended order for fees and costs will issue.

b. Compensatory Damages

Complainant alleges medical costs associated with ailments that occurred or were aggravated by TVA's unlawful acts. These costs are fully recoverable under the Act. *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983) In accordance with this provision, complainant has submitted a statement of medical

---

expenses incurred from August, 1989 through November, 1990 (PX 46). However, these statements reflect the total expenses, not the unreimbursed expenses for which Complainant is due compensation. The record also contains a printout of Complainant's medical claims under his group medical insurance for the years 1987 through 1989 (PX 44). The alleged violation arose at the earliest in April, 1989 with the disciplinary meeting and the decision to subject Complainant to the RIF. Accordingly, I find that only expenses that arose after the protected activity and initial adverse action of April 7, 1989 by the Respondent are recoverable.

Dr. Mark D. Prince, the Complainant's personal physician, testified in his deposition that the stress of Complainant's employment from January, 1989 through June 1989 clearly aggravated pre-existing ailments (PX 10 at p. 7). Complainant suffers from a mitral valve prolapse condition, gastritis, probable gastric ulcers and Crohn's disease which is an inflammation of the gastrointestinal system (PX 10 at p. 5, 10). Though the mitral valve coronary condition likely is a product of heredity, Dr. Prince testified that Complainant's employment related stress aggravated the condition causing a frequency of chest pain (PX 10 at P. 6). Similarly, though Complainant has suffered from castritis for several years, his anxiety about his job has increased his symptoms and gastric ulcers have developed only within the last five years (PX 10 at p. 22). Dr. Prince concluded his testimony indicating that a large percentage of Complainant's medical visits within the last few years derived from stress related aggravation of his ailments (PX 10 at p. 20).

Credible testimony of the Complainant and his wife corroborates the effect of Respondent's illegal acts upon his physical health. Mrs. DeFord testified that Complainant became physically ill following the meeting of April 7, 1989 and continued to suffer from sleeplessness, nervousness, and heart pains (Tr. 726-727) Complainant testified that he suffers from tension headaches and depression and that just prior to the hearing he was diagnosed with two new ulcers (Tr. 339). Accordingly, I find that stress originating with and deriving from the April 7, 1989 meeting and subsequent events aggravated Complainant's pre-existing gastrointestinal and coronary conditions and caused other nervous symptoms. Thus, Complainant shall file within twenty (20) days of the affirmance of this Decision and Order by the Secretary of Labor a documented statement of all unreimbursed

---

medical expenses attributable to ailments that developed or were aggravated during the time of Respondent's illegal activities.

Finally, Complainant alleges compensatory damages for a variety of subjective injuries including pain and suffering, emotional distress, damage to his professional reputation, and loss of enjoyment of life. On issues of subjective losses, Complainant carries the burden to establish both the "existence and the magnitude" of these injuries. *Busche, supra*, at P. 519. Moreover, there must be a "rational connection" between the existence of the loss and the Respondent's illegal acts. Finally, the amount of the award should fall in line with awards for such injury in similar cases. *McCuistion, supra* slip op. at pp. 18-22 (Cataloging and reviewing similar awards).

Complainant has provided significant proof of harassment by Moreadith in the April 7, 1989 meeting and his subsequent RIF along with accompanying aggravation of his physical ailments to warrant a finding of emotional distress. Complainant suffered from "tension" headaches and depression throughout this period and following his unlawful termination. His family life also became adversely affected due to the reoccurring medical problems and financial instability (Tr. 534-535, 728). In such circumstances,

Courts have found damages ranging from $10,000.00 to $50,000.00. *McCuistion, supra*. Indeed, in his earlier case, DeFord was awarded $10,000.00 for emotional distress in the Secretary's remand decision. *DeFord v. Tennessee Valley Authority*, 81-ERA-1 (Sec'y Remand Dec., April 30, 1984). The testimony of Complainant's personal physician, Dr. Prince, and his wife provides insight into the repercussions of Respondent's illegal acts. Complainant suffered chest pains, developed new ulcers, suffered sleeplessness and anxiety from his unlawful termination all of which are indicative of emotional distress. *See Fleming, supra; McCuistion, supra.*

In this second violation, Moreadith, the culpable TVA manager, took it upon himself to not only to humiliate and demoralize Complainant for his protected acts, but went so far as to devise a scheme to terminate him. Moreadith set the stage within his department to foreclose any transfer opportunity to Complainant by letting it be known to his subordinates that DeFord was not to be selected for a position within the new organization. Complainant worked in this hostile environment for over sixty days until his so-called automatic RIF became effective

---

[Page 27]

all the time expecting that a new position would become available. It is entirely reasonable to believe that these circumstances demonstrating a second round of discrimination against the Complainant induced more stress than the demotion in 1980 that resulted in the previous award.

In fact, in cases awarding damages for emotional distress, the awards in discharge cases are generally higher than those involving demotions or instances of harassment. *See Webb v. City of West Chester, Ill.*, 813 F.2d 824, 836, n.3 & 4 (7th Cir. 1987)(cathloging cases); *McCuistion, supra*. I find that in this discharge case, the Complainant suffered sufficient anxiety over these events to aggravate serious medical conditions and cause sleeplessness, headaches and depression indicating severe emotional distress. *See Fleming v. County of Kane, State of Ill.*, 898 F.2d 553 (7th Cir. 1990); *McCuistion, supra.*

In considering the amount of recommended damages for emotional distress I find compelling the fact that Moreadith, the wrongdoer, received a $50,000.00, cash settlement for terminating his employment relationship with TVA. It remains in this record unclear whether the departure by Moreadith was truly voluntary. One fact is clear, that Moreadith's employment with TVA terminated the day after he refused to sign a statement for TVA's inspector general regarding his investigation of DeFord's allegations of discrimination. Although I would normally be inclined toward a lesser amount for damages in this area, it strikes me as patently unjust that the wrongdoer should receive more than the victim of his actions. Accordingly, I find that Complainant has proven significant damage from emotional distress attributable to Respondent's acts and I hereby award $50,000.00 in damages, the same amount given to Moreadith in settlement for termination of his employment with TVA.

However, there is little authority to support a claim for what Complainant alleges as "hedonic" damage or loss of enjoyment of life. Moreover, such claims generally reflect the same underlying emotionally stressful situation or financial difficulty which are included in the other compensatory remedies. I, therefore, do not find an award for hedonic damages warranted under the Act.

Finally, Complainant alleges, but fails to provide any proof, that he incurred damage to his professional reputation due the Respondent's illegal acts. Although Complainant alleges that

---

[Page 28]

being known as a whistleblower is detrimental professionally, it appears he has been able to market himself within the nuclear industry sufficient to maintain a reasonable income. In order to justify some form of award for such damage, there must be proof of detrimental loss. In this case, the Complainant has not shown that he has been blacklisted or precluded from positions in the nuclear or engineering fields due to Respondent's acts. Accordingly, I find no calculable damage to Complainant's professional reputation. Thus, no award is recommended for this item of claimed damages.

III. RECOMMENDED ORDER

Based on the foregoing, it is hereby recommended that an ORDER be issued by the Secretary of Labor providing that the Tennessee Valley Authority is to:

1. Reinstate the Complainant to his former or equivalent position of employment within the Engineering Unit of their Nuclear Power Group or another comparable position at the appropriate pay group level to reflect the current status of his former position; and, restore all other applicable terms and conditions of employment including, but not limited to, his pension, annuity, life insurance, and health insurance benefits.
2. Compensate Complainant for all salary lost due to his unlawful termination of June 16, 1989 through the date of his reinstatement at the same grade and pay level he would have received if he had continued in their employ, with interest, as provided in 29 U.S.C. 1961. The back pay amount is to be offset by any post termination earnings to be determined in a Supplemental Recommended Order.
3. Cease and desist any and all discrimination against Complainant in any manner with respect to his compensation, terms, conditions or privileges of employment because of acts protected under the provisions of the Act and purge any references concerning the Complainants protected act, the memo of March 29, 1989 or his unlawful termination of June 15, 1989.
4. Reimburse the Complainant for medical expenses incurred by him as a result of their unlawful acts to be determined in a Supplemental Recommended Decision and Order.

HR>[Page 29]

5. Pay to the Complainant in the amount of $50,000.00 for the emotional distress he incurred as a result of its unlawful discrimination against him.
6. Pay to the Complainant or his counsel the amount of his reasonable costs and expenses in pursuit of this claim. The amount of such costs will be determined in a Supplemental Recommended Decision.

It is further RECOMMENDED that Complainant by and through counsel be hereby ORDERED to file documentation of claims for back pay, medical costs, costs incurred in finding a new position, and costs including attorney's fees for pursuit of this claim as previously outlined within twenty (20) days of the affirmance of this Recommended Decision and Order by the Secretary of Labor.

It is further RECOMMENDED that, except as provided above, all other remedial relief sought by Complainant be denied.

DANIEL J. ROKETENETZ
Administrative Law Judge

[ENDNOTES]

[1]In this decision and Order, "ALJX" refers to Administrative Exhibits; "PX" refers to Complaintant's Exhibits; "RX" refers to Respondent's Exhibits; and "Tr." refers to the official transcript.

[2]On June 9, 1989 Complainant submitted a letter to the Wage and Hour Office of the Department of Labor in Knoxville complaining of various events and his impending termination. However, he advised Carol Merchant of that office to "hold up sending" the complaint because he wanted to resolve the situation "within TVA where (he) would not leave" (Tr. 482; PX 8). This "filing" then was not processed and I find, as such, that it does not constitute a filing of a complaint under the Act.